No. 13555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE TAKEHARA,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE JAMES ALGER FEE, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

QUESTION PRESENTED BY THE APPEAL

The appellant while adopting in his brief (page 7) his Statement of Points as set forth on pages 30 and 31 of the Transcript of the Record, has apparently abandoned in his "Specification of Errors" (pages 7 - 10), those points previously raised as to

the national status of Japan at the time herein involved, and the constitutionality of Title 8, U.S.C.A., Sec. 801(e).

The principal question now, therefore, presented appears to be: Does the record support the District Court's grounds for denying the application herein?

(1) Because Appellant's actions show clearly that he chose Japanese citizenship after arriving at majority.

(2) Because Appellant renounced American citizenship in the manner prescribed by acts of Congress by voluntary voting at a Japanese election.

STATEMENT OF THE CASE

This cause arises under Title 8, U.S.C.A., Section 903, by reason of an action instituted by the appellant herein on June 6, 1951, in the court below, against the appellee, Dean G. Acheson, Secretary of State of the United States, in the district in which appellant claimed his permanent residence, for a judgment declaring appellant to be still a citizen of the United States.

This action followed the denial of his application made to the Vice Consul of the United States at Kobe, Japan, on February 27, 1950, for a passport as a

National of the United States; which denial was evidenced by Certificate of Loss of Nationality of the United States issued by the Vice Consul on August 11, 1950, and approved by the Department of State February 23, 1951, on the ground that appellant had expatriated himself under the provisions of Section 401(e) of Chapter IV of the Nationality Act of 1940, (Title 8, U.S.C.A. 801 (e)), by voting in the Japanese political election of April 5, 1947.

The appellant entered the United States upon the Statutory Certificate of identity provided in such cases, pursuant to Section 3(2) of the Immigration Act of 1924, (8 U.S.C.A. 903), as a temporary visitor for business for such period of time as necessary to prosecute his claim to United States citizenship, and for such time to the residence designated by the Immigration Service within the district.

After a hearing before the Court on December 20, 1951, at which the appellant testified in his own behalf through an interpreter, the District Court denied the appellant's claim on the grounds and for the reasons stated in the written opinion of the Court. (R. 23-27)

Findings of Fact and Conclusions of Law, consonant with the Court's opinion, were entered August 9, 1952, (R. 10-14), and based thereon a judg-

ment, denying appellant's complaint and dismissing his action, and allowing defendant costs in the sum of $23.00, was entered August 9, 1952. (R. 15-16).

From that final judgment appellant has brought this appeal. (R. 28-31).

PERTINENT STATUTES

Section 401 of the Nationality Act of 1940, as amended, Title 8, U.S.C.A., Section 801, provides that a national of the United States may lose his nationality in certain prescribed ways:

Such section provides in relevant part:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, * * *;
>
> or
>
> * * * * * * * * * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; * * * *."

Section 403 of said Act, Title 8, U.S.C.A., Section 803, in pertinent part provides:

> "(b) No national under eighteen years of age can expatriate himself under Subsections (b) to (g), inclusive, of Section 801."

ARGUMENT

1. Appellant's Actions Show Clearly that He Chose Japanese Citizenship After Arriving at Majority.

The District Court's findings, (R. 10-14), omitting procedural matters, and with relevant pages of record supplied, were:

I.

"That the plaintiff, George Takehara, was born at Firwood in Pierce County, Washington, United States of America, on March 13, 1926, of Japanese born parents who were nationals of Japan, and by virtue of his birth, plaintiff was a citizen of the United States, and by virtue of the nationality of his parents plaintiff was at birth a national of Japan." (R. 40, 44, 47, 83).

II.

"That at the approximate age of 4 years, the plaintiff traveled to Japan for a visit with his grandparents on a 1928 passport issued to him when he was 2 years of age, and that after some months there, returned to the United States; that thereafter in the year 1935 at the age of nine years, the plaintiff in company with his older brother, again traveled to Japan to be with his grandparents and other relatives in Japan; that the brother returned to the United States in 1939, (R. 42), and the plaintiff remained in Japan and attended school during his minority and worked on a farm." (R. 44, 45, 48).

III.

"That during World War II, the plaintiff was given a physical examination preliminary to serving in the Japanese armed forces, but did not meet the requirements of that service as to weight and height, and was rejected for that reason." (R. 48-50).

IV.

"That plaintiff shortly after attaining his majority voted in the Japanese political election of April 5, 1947, during the military occupation of Japan by the Armed Forces of the United States." (R. 53-57).

V.

"That thereafter on February 27, 1950, approximately three years after voting in said Japanese election, the plaintiff applied * * * for a passport as a national of the United States; that such application was denied * * *." (R. 64-84).

* * *

VII.

"That the evidence before the court reveals that the plaintiff in implicit obedience to his elders and without objection on his part at any time had grown up from early childhood as a Japanese national, completely forgetful of the language, customs and ways of the land of his birth, and that neither at the time of nor at any time prior to the Japanese political election on April 5, 1947, had he then or on any other occasion asserted his claim to American citizenship or objected to being treated by his elders or the authorities as a Japanese National, (R. 48, 52-53), and such being the situation and

> in view of the plaintiff's antecedents, his upbringing and schooling in the language, customs, habits and ways of Japan by those equally unobservant of anything attached or related to his becoming a National of the United States by choice, (R. 48, 59, 61), and in view of his naturalization as a Japanese National and his admitted ignorance of the effect of his voting upon his claim to American citizenship, (R. 51, 57), it must follow that the plaintiff had no reason to abstain from voting in the Japanese political election of April 5, 1947, and did so as a natural consequence of a Japanese National's interest therein, by whatever inducement, and without any relation or reference to his claim to being a national of the United States." (R. 61).

In addition to the appellant's testimony at the hearing before the District Court, appellant's application for passport on February 27, 1950, contained in the State Department's records, placed in evidence, (R. 62-63), further supports the Court's findings, wherein the question is stated: (R. 85-86).

> "Have you ever been registered as a national of Japan or any other foreign country, or obtained a passport, certificate, card or other document therefrom in which you were described as a National of a country other than the United States?"

After answering the foregoing in the affirmative, appellant made the following response to request therein for details:

"I applied for my Japanese Nationality on January 12, 1943, and the permission was granted on March 10, 1943. I established by own Family Register on May 25, 1943." (R. 86).

At the time of hearing before the Court, appellant, in answer to a question relative to the Japanese Government's refusal to accept foreign citizenship of that country's nationals, testified through his interpreter:

"Unless you are registered they treated you as a foreigner." (R. 61).

And when asked if he, appellant, did anything to refuse to accept Japanese citizenship, his answer was:

"No, I have not." (R. 61).

While stating that "the question of election of citizenship was not an issue in this case," (Appellant's Brief 17), counsel for appellant argue that the Court does not cite any act, aside from the appellant's voting, done by the appellant which would indicate an election by the appellant of Japanese citizenship as against American citizenship. (Appellant's Brief 19).

However, the District Court did not permit minor acts to obstruct the greater view of surrounding facts, and so stated:

> "The question wasn't whether he wanted to acquire Japanese citizenship, the question was whether he wanted to accept Japanese citizenship because as I understand the international features of it, the claims were made by the Empire of Japan, or the Emperor of Japan, that a Japanese born of Japanese nationals in the United States still acquired Japanese citizenship and the duty and obligation of loyalty to the Emperor. So the question is whether he intended to accept Japanese citizenship and assume its responsibilities." (R. 60).

Counsel further argue (Appellant's Brief 19) that the facts were far stronger indicating election of Japanese citizenship in *Kawakita v. United States*, 343 U. S. 717, than in the instant case.

Counsel, in their enumeration of factors indicating such election, fail to take into consideration those factors by which the Supreme Court found that Kawakita had maintained his right to a return passport, set forth at pages 720 and 721, of said reports. These disclose that Kawakita was 18 years old before he went to Japan. Certainly, it may be assumed, that he had not been reared as a Japanese national, but rather as an American citizen. With that background, it was imperative that he distinctly do some act described in the statute as effecting expatriation. He may have committed crimes against humanity and his fellowmen, but he did not commit the acts of expatriation, defined by Congress.

Appellant's case has been built upon the facts of his complete subjection to all things Japanese, from early childhood to the time of his application for a passport to return to America. (R. 93-97).

In the Court's acceptance of appellant's own version of his background, it is difficult to see how any other conclusion could have been reached by the District Court, except as stated in the latter part of its opinion:

> "Takehara lost his citizenship by his conduct of which voting is a minor factor. He was born in the United States in 1926. A passport was issued to him when he was two years old, and upon this he was taken to Japan where he remained for some months. In 1935, when nine years old, he again was taken to Japan to be with his grandparents and other relatives, and has ever since remained there until brought to this country to prosecute this case. He was brought up with the native Japanese tradition and educated in a family and social background requiring implicit obedience to his elders and the Imperial Government of the Emperor. He was educated exclusively in Japanese schools and upon failure to obtain a sufficient mark to become an officer in the Japanese Army, served as teacher in the official schools. He has no education in English or training in our form of government.
>
> "Against this background, his actions indicate a definite choice of Japanese citizenship, exercised after he had attained majority. American citizenship by birth cannot be lost involuntarily, but it can be lost by voluntary conduct after ma-

jority by one who, by virtue of his residence, his official registration, his ancestry and members of his family, is entitled to Japanese citizenship.

"The mere fact that the elders of the Japanese clan to which plaintiff belongs have now decided that he should seek to recoup this birthright which he has renounced and that he has obeyed them is of no consequence. Since responsibility is individual, as well as allegiance, it would seem impertinent that a brother of plaintiff was killed in our service during the war and that another is presently in the army.

"In this day of conflicting ideologies, the courts would be remiss if, for the purpose of indicating a lack of race prejudice, there were a deviation by rationalization from the statutes enacted by Congress for protection of the country." (R. 26-27).

Appellant's brief at pages 17 and 18 call attention to several discrepancies covering the matter of schooling and occupation referred to by the Court in its opinion.

Considering the fact that plaintiff had completely forgotten the American language and very likely whatever else of knowledge acquired in in America, the District Court might well say that "he was educated exclusively in Japanese schools," in the absence of a determination that what is forgotten is also a part of education.

To the further contentions of appellant, (Appellant's Brief, 20, 21) it is appellee's position that a

natural born citizen of the United States is not required to elect between dual citizenships upon reaching majority, but in case such citizen does elect as in the instant case, these further questions or contentions of appellant should be considered moot.

2. Appellant Renounced American Citizenship in the Manner Prescribed by Acts of Congress by Voluntary Voting at a Japanese Election.

In the Questionnaire, subsidiary to appellant's application for passport, at page 87 of the Record, the following questions asked and answers made by appellant on February 27, 1950, appear:

"C. Voting in a Foreign Country."

"1. Have you ever voted in a political election in Japan or any other foreign state or participated in an election or plebiscite to determine sovereignty over a foreign territory?

(Yes or No): Yes.

"If so, give date and place of voting and nature of each such election or plebiscite.

(Answer) April 10, 1946, Zenshoji Temple, Tannowamura, Sennar-gun, Osaka-fu, to elect Member of the House of Representatives.

(Official correction as to year of voting. (R. 74-75.)

"2. Prior to voting, did you make a claim to

citizenship of the United States to any local or national official?

(Yes or No): No.

"3. Did you request exemption from voting?

(Yes or No): No.

"4. Were you urged, advised or coerced to vote by any official or other person?

(Yes or No): No.

* * *

"6. In connection with voting, did you ever consult an American foreign service officer concerning an effort to influence you to vote?

(Yes or No): No.

"7. Give detailed statement of your reason for voting.

(Answer) Overhearing rumors that non-participants were to be punished caused me to vote and I did not know that one loses his American citizenship by voting."

It should be observed that these answers were made by appellant after he obviously knew that voting would result in his loss of American citizenship. It should also be observed that the claim of fear of loss of ration card was a later development in the present claim of duress.

A consideration of these answers and appellant's testimony were sufficient, appellee submits, to cause the District Court to express in its opinion its own reaction in these words: (R. 23).

> "A good deal of his examination indicated to the Court that he was highly evasive, if not false in his testimony. Whenever the shoe pinched, he had a ready remedy."

Counsel for appellant find consolation in the recognition by the Court in the case of *Acheson v. Kuniyuki*, 189 F. (2d), 741, of the principle of involuntary voting or voting under duress, although the Court found no application of that principle in the case before it.

The best illustration in the instant case of whether ignorance of the law or duress in voting is involved is found in counsel's argument of the case to the District Court: (R. 96).

> "Now, the plaintiff did not know that he would lose his citizenship if he voted. He did not intend to lose his American citizenship according to his testimony, and from all of the testimony in evidence here, it certainly wasn't his free, intelligent voluntary choice, *but was done under legal duress, and when plaintiff learned that such voting would endanger his American citizenship, he voted no more.*" (Emphasis ours).

Examination of pages 75-79 of the Record, particularly 75, will disclose the Japanese voting as

taking place on April 5, 20, 25 and 30, 1947. It is natural to assume that if duress existed on April 5, 1947, that it continued for the remainder of the month, at least. However, the alleged overwhelming force compelling appellant to vote melted away in the light of learning that appellant might face the unknown danger of losing American citizenship, and under the restraint of that uncertain danger he abstained from voting, notwithstanding the alleged exhortations, inducements and admonitions hitherto claimed as effective.

Accordingly, it must be contended, in view of the appellant's Japanese antecedents, his upbringing and schooling in Japan, his naturalization as a Japanese national, and in view of his admitted ignorance of the effect of his voting upon his claim to American citizenship, that it would appear that appellant had no reason at such time to abstain from voting and that he did so as a natural consequence of his upbringing and training as a Japanese national, and not by reason of any duress.

On rehearing, the United States Court of Appeals for the Ninth Circuit, in *Acheson v. Mariko Kuniyuki*, 190 F. (2d) 897, cert. den. 342 U. S. 942, without mention of the principle of involuntary voting, denied the petition for rehearing on the basis

of the ancient rule, pertinent to the facts in that case, that ignorance of the law is no excuse, whatever may be the language in which it is expressed.

See *Savorgnan v. United States*, 338 U.S. 491, 496; *Savorgnan v. United States*, 171 F. (2d) 155, 159.

Appellant's Brief, pages 10-17, cites numerous district decisions in which the courts have determined the Japanese election of 1946, the first under the occupation, was attended with such fanfare and patriotic fervor as to render it unduly coercive.

See in this connection *Shirakura v. Royall*, 89 F. Supp. 713, 715. See also *Yamamoto v. Acheson*, 93 F. Supp. 346; *Kuwahara v. Acheson*, 96 F. Supp. 38.

Of this district cases cited by appellant, it appears that the election of 1946 was the one examined by the courts and determined to be coercive and of undue influence, in all except the case of *Uyeno v. Acheson*, 96 F. Supp. 510, in which a minor who was permitted to vote, testified to inducements extremely familiar to the reported descriptions of the election of 1946.

Unless it can be assumed that the Japanese elections of 1947 must of necessity have been likewise

accompanied by all the emotion that attended the first of 1946, there is a great lack of reported decisions in the district courts to substantiate the claim in the instant case on that point.

This court has held that a person 20 years of age lost his status as a national of the United States by voting in a primary local election in Mexico after being taken to that country of his parent's origin at the tender age of 5 years.

See *Miranda v. Clark*, 180 F. (2d) 257.

Appellee fails to see grounds in the instant case for a different interpretation of the statute when applied to other nationals.

CONCLUSION

For the foregoing reasons, it must be contended the decision below should be affirmed.

Respectfully submitted,

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